

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

TRANSCRIPT OF RECORD.

Court of Appeals of the District of Columbia.

OCTOBER TERM, 1920.

No. 3419. 669

**W. M. FREENY COMPANY, INC., A CORPORATION,
APPELLANT,**

vs.

R. BEN BOERNER.

**APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.**

FILED JULY 6, 1920.

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No. 3419.

W. M. FREENY COMPANY, INC., A CORPORATION,
APPELLANT,

vs.

R. BEN BOERNER, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

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Court of Appeals of the District of Columbia.

No. 3419.

W. M. FREENY, INC., a Corporation, Appellant,

vs.

R. BEN BOERNER.

a Supreme Court of the District of Columbia.

At Law. No. 63187.

R. BEN BOERNER, Plaintiff,

vs.

W. M. FREENY COMPANY, INC., a Corporation, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 Declaration.

Filed December 18, 1919.

In the Supreme Court of the District of Columbia.

At Law. No. 63187.

R. BEN BOERNER, Plaintiff,

vs.

W. M. FREENY COMPANY, INC., a Corporation, Defendant.

First Count.

The plaintiff, R. Ben Boerner, sues the defendant, W. M. Freeny Company, Inc., a corporation, for money payable by the defendant

to the plaintiff for goods sold and delivered by the plaintiff to the defendant; and for work done and materials provided by the plaintiff for the defendant at his request; and for money lent by the plaintiff to the defendant; and for money paid by the plaintiff for the defendant at his request; and for money received by the defendant for the use of the plaintiff; and for money found to be due from the defendant to the plaintiff on accounts stated between them. And the plaintiff claims the sum of Five Thousand dollars (\$5,000.00) damages, together with interest, besides costs.

Second Count.

The plaintiff R. Ben Boerner, further sues the defendant, W. M. Freeny Company, Inc., a corporation, for that on or about the month of July and August, 1917, the said defendant contracted with and promised the said plaintiff to pay to him the sum of Forty dollars (\$40.00) per week, for the services and labor of the said plaintiff, and in addition thereto, the said defendant promised and
2 agreed to pay to the said plaintiff the sum of five per centum (5%), as a commission, on all of the gross business in excess of forty thousand dollars done by the defendant, during the year ending July 28, 1918. The said plaintiff, relying upon the said promises and undertakings of the said defendant, worked for the said defendant for one (1) year ending July 28, 1918, upon the terms of the said contract and agreement.

The plaintiff avers that the defendant's gross business during the said year, amounted to-wit, to something about One Hundred Thousand dollars (\$100,000.00), and according to the said terms of the said contract and agreement, the said defendant owes to the said plaintiff, and there is now due and owing from the defendant to the said plaintiff, under the terms of the said contract, five per centum (5%) upon the said sum of money in excess of forty thousand dollars, to-wit sixty thousand dollars, making the amount due the plaintiff Three Thousand Dollars.

The said plaintiff avers that notwithstanding the said promises and agreements of the said defendant as aforesaid, the said defendant has not paid to the said plaintiff the said sum of money, or any part thereof, but has wholly failed and refused to pay the same, and still fails and refuses.

Wherefore, the plaintiff brings this suit and claims the sum of Five Thousand dollars (\$5,000.00) damages, besides costs.

T. M. WAMPLER,
FOSTER WOOD,
Attorneys for Plaintiff.

3

Pleas.

Filed January 8, 1920.

* * * * *

1. For plea to the first count of plaintiff's declaration, the defendant says that it is not indebted as therein alleged.

2. For plea to the second count of plaintiff's declaration, the defendant says it did not promise as therein alleged.

WALTER P. PLUMLEY,
Attorney for Defendant.

Memoranda.

January 20, 1920.—Joinder of Issue, Note of Issue and Notice of Trial—filed.

March 22, 1920.—Verdict for Plaintiff for \$1,233.88.

March 25, 1920.—Motion for a new trial—filed.

Supreme Court of the District of Columbia.

Friday, April 16th, 1920.

Session resumed pursuant to adjournment, Mr. Justice Hitz presiding.

* * * * *

This cause coming on for hearing upon the motion of defendant for a new trial filed herein, and being argued and submitted to the Court, it is considered that said motion be, and the same
4 hereby is overruled, and judgment on verdict is ordered.

Wherefore, it is considered that the plaintiff herein recover of defendant the sum of one thousand, two hundred and thirty three and 88/100 dollars, (\$1,233.88) with interest thereon from this date, being the money payable by said defendant to plaintiff by reason of the premises, together with the costs of suit, to be taxed by the Clerk, and have execution thereof.

From the foregoing judgment the defendant by its Attorney in open Court, notes an appeal to the Court of Appeals of the District of Columbia, and the penalty of a bond on said appeal to operate as a Supersedeas is hereby fixed in the sum of Two thousand dollars, (\$2,000.00).

Memorandum.

April 16, 1920.—Appeal Bond (Supersedeas) approved and filed.

Supreme Court of the District of Columbia.

Friday, May 28, 1920.

Session resumed pursuant to adjournment, Mr. Justice Hitz presiding.

* * * * *

Now comes here the defendant by its Attorney of record and submits to the Court its Bill of Exceptions taken at the trial of this cause, and the same is taken under consideration by the Court; thereupon the Court signs said Bill of Exceptions, and orders the same of record as of the time of the noting thereof at the trial.

5

Assignment of Errors.

Filed June 14, 1920.

* * * * *

1. The Court erred in his charge by instructing the jury as to the amount of the verdict provided they found for the plaintiff, instead of permitting the jury to determine for themselves from the evidence, the gross amount upon which commission, if any, was due the plaintiff.

2. The Court erred in instructing the jury not to consider the \$680.00 which plaintiff had admitted in his Bill in Equity he had received on account of his said commission, although the Court had permitted said Bill in Equity to be introduced in evidence.

3. The Court erred in instructing the jury to disregard the sum of \$1,770.49 claimed by defendant as an amount allowable to be deducted from the gross amount of business shown by defendant's books.

4. The Court erred in granting and giving to the jury the prayer No. 1½ submitted on behalf of the plaintiff.

5. The Court erred in overruling the motion for a new trial on the ground that the verdict was contrary to the evidence and to the weight of the evidence.

WALTER P. PLUMLEY,

Attorney for Defendant.

Designation of Record.

Filed June 14, 1920.

* * * * *

Mr. Morgan H. Beach,

Clerk of the Supreme Court of the District of Columbia.

SIR:

In making up the record on appeal in the above-entitled cause you will please include the following papers:

6

1. Declaration.
2. Pleas of Defendant.
3. Joinder of Issue.
4. Memo. of Verdict.
5. Judgment on Verdict.
6. Memo. of Appeal Noted.
7. Memo. of Appeal Bond Approved and Filed.
8. Bill of Exceptions Submitted.
9. Bill of Exceptions Signed and Filed.
10. Assignments of Error.
11. This Designation.

WALTER P. PLUMLEY,
Attorney for Defendant.

7 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Morgan H. Beach, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 6, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 63187 at Law, wherein R. Ben Boerner is Plaintiff and W. M. Freeny Company, Inc., a corporation, is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 1st day of July, 1920.

[Seal Supreme Court of the District of Columbia.]

MORGAN H. BEACH,
Clerk.

E. W.

8 In the Supreme Court of the District of Columbia.

At Law. No. 63187.

R. BEN BOERNER, Plaintiff,

vs.

W. M. FREENY COMPANY, INC., a Corporation, Defendant.

To T. Morris Wampler, Esq., and
Foster Wood, Esq.,
Attorneys for Plaintiff:

Please take notice that on May 28, 1920, at ten o'clock A. M., or as soon thereafter as counsel can be heard, the proposed Bill of

Exceptions, a copy of which is herewith handed you, will be submitted to the Court for settlement.

WALTER P. PLUMLEY,
Attorney for Defendant.

Service of the above notice, and of a copy of the proposed Bill of Exceptions is hereby acknowledged this 17 day of May, 1920.

FOSTER WOOD,
Attorney for Plaintiff.

9 In the Supreme Court of the District of Columbia.

At Law. No. 63187.

E. BEN BOERNER, Plaintiff,

vs.

W. M. FREENY COMPANY, INC., a Corporation, Defendant.

Bill of Exceptions.

Be it remembered that at the trial of this cause before Mr. Justice William Hitz and a jury the following testimony was offered:

Plaintiff, R. BEN BOERNER, in his own behalf, testified that on the 29th day of July, 1917, he was employed by William M. Freeny, President of the W. M. Freeny Company, a corporation engaged in the tailoring business, as a cutter, at a salary of \$40.00 per week, and that on the 8th day of September, 1917, without solicitation on the part of the plaintiff, Mr. Freeny offered to pay him a commission of 5% on the gross amount of business in excess of \$40,000.00 done up to and including July 28, 1918, and that, beginning with September 10, 1917, the defendant would pay the plaintiff the sum of \$45.00 per week, the extra \$5.00 per week to be paid on account of plaintiff's commission; that Oscar Miller, one of defendant's employees, was near and heard the conversation and that every one in the store knew of this verbal agreement; that on February 23, 1918, Mr. Freeny asked plaintiff if he needed money and took him to the bank, gave him \$225.00 and took plaintiff's note for the same, said note payable to the W. M. Freeny Co. on July 28, 1918, when the term of plaintiff's employment expired, and which note was

10 to be surrendered to him on said date and credited on his commission; that witness testified that the said note was surrendered to him in accordance with this agreement and offered in evidence a note for \$225.00, dated February 23, 1918, and payable to the W. M. Freeny Co. on July 29, 1918, but said note was not marked "Paid" or "Cancelled." Witness testified that at the time Mr. Freeny surrendered the said note to him Mr. Freeny said that upon the return of witness from his vacation the corporation would make final settlement with him for his commission.

On cross-examination

said plaintiff admitted that on June 11, 1918, the Freeny Co. loaned him \$25.00, and that on July 29, 1918, two days after the beginning of his vacation, said corporation advanced him \$200.00 on account of his commission and at the same time surrendered to him the note for \$225.00 which had been offered in evidence, and also agreed to pay him the balance of his commission upon his return from his vacation. Witness also testified that he received the \$5.00 per week on account of commission for a period of 47 weeks. Plaintiff also admitted that he had previously filed in the Supreme Court of the District of Columbia a Bill in Equity, No. 36,141, for an accounting in this matter, and that the said cause was certified to the Circuit Court for trial, and that in said bill he had sworn that he had received from the Freeny Company the sum of \$680.00 on account of said commission; that the said bill was offered in evidence. Witness denied that he signed two notes, each for \$225.00, one payable to the W. M. Freeny Co. and one to W. M. Freeny, on February 23, 1918.

Thereupon plaintiff produced as a witness ———, who testified that he was an auditor with several years' experience, and that on behalf of plaintiff he had examined and audited the books
11 of the defendant corporation with Mrs. Amelia Peterson, the bookkeeper of said corporation; that the total amount of sales shown on the books of the corporation was \$73,877.67; also that the books showed, as included in this amount, canceled orders amounting to \$501.85; suits made up for customers, but left on plaintiff's hands, amounting to \$700.50; model coats made for window display and suits made for employees at costs amounting to \$568.14, a total of \$1,770.49.

On cross-examination

the witness testified that the Freeny Company claimed the said amount of \$1,770.49 as an allowable deduction in determining the gross amount of business done by the firm.

Thereupon plaintiff produced as a witness OSCAR MILLER, who testified that he was employed as a chopper by the W. M. Freeny Company for several months; that witness was present in the cutting room and heard Mr. Freeny say to plaintiff, "I tell you what I will do; I will give you 5% on all above your salary"; that, after being pressed by plaintiff's counsel and being shown a paper, which developed to be an affidavit which the witness had signed some time previously, witness then testified that the agreement which he overheard was that Mr. Freeny would pay to plaintiff 5% on all business above \$40,000.00, and that Mr. Freeny would show plaintiff his book, showing the amount of business done from time to time.

On cross-examination

the witness was asked whether he was not very friendly with Mr. Boerner, which he denied, and whether he did not have a feeling against the Freeny Company because he had been discharged for drunkenness after working for said company for five weeks, which he also denied.

12 Thereupon plaintiff produced as a witness Mrs. MINNIE MITCHELL, who testified that Mrs. Freeny was at her home about some dressmaking, and Mrs. Freeny told her that Mr. Freeny owed Mr. Boerner the money he was suing for and that she hoped he would make Mr. Freeny pay it.

On cross-examination

witness was asked whether she did not have a feeling against Mr. and Mrs. Freeny because of a bill for \$36.00 for dressmaking for Mrs. Freeny which she had given to a lawyer to collect, and which Mr. Freeny had refused to pay, because he held a paid check which she had cashed for \$25.00 on account of this bill. Witness admitted these facts, but denied that she had any feeling against Mr. or Mrs. Freeny because of the occurrence.

Thereupon defendant produced as a witness WILLIAM M. FREENY, who testified that he was President of the W. M. Freeny Company, a corporation engaged in the tailoring business, and as such hired all employees; that one Sunday afternoon late in June, 1917, he drove through Rock Creek Park with Mr. Boerner and C. C. Martin, and during the drive the question of employment of plaintiff as a cutter by the Freeny Company was discussed; that witness offered plaintiff \$40.00 per week, but plaintiff asked for more money, which witness refused to give; that plaintiff agreed to accept the employment at \$40.00 per week and started to work for the Freeny Company on July 30, 1917; that on September 8, 1917, plaintiff came to witness, stating that he could not live on \$40.00 per week, and that if witness would raise his salary he would be willing to work nights if necessary; that witness did raise plaintiff's pay to \$45.00 per week, beginning September 10, 1917; witness denied that on February 23, 1918, he asked plaintiff if he needed money, but that on the

13 contrary, on that day plaintiff came to him with a hard luck story about his furniture being attached in Norfolk, and that he needed \$450.00; that he would have some money coming to him in the summer from the sale of property in which he and his brother were interested, and that he would pay back the loan at that time; that witness told him he was not willing to loan him the entire amount from the firm's money, but that he would loan him \$225.00 from the Freeny Company and the other \$225.00 from his personal funds; that witness directed Mrs. Peterson, bookkeeper for the Freeny Company, to draw two notes for \$225.00 each, one payable to William M. Freeny on demand and one payable to the W. M.

Freeny Company on July 29, 1918, which plaintiff signed; that witness then directed the bookkeeper to draw a check of the Freeny Company for \$225.00, which he gave to plaintiff, and that he then gave him \$225.00 in cash as his personal loan; that on June 1, 1918, plaintiff paid \$225.00 and took up the note payable on demand to William M. Freeny personally, and witness marked said note "Paid and Cancelled"; that on June 11, 1918, the defendant loaned plaintiff \$25.00, and on July 29th defendant loaned plaintiff \$200.00 and took his notes for both loans, which notes have not been paid; that the note offered in evidence payable to the W. M. Freeny Co. on July 29, 1918, was never paid, but was missing from the safe, as were the other notes which plaintiff gave to witness. Witness further testified that in the absence of himself and the bookkeeper plaintiff took charge of the office and had access to the safe. Witness denied that he ever agreed to pay plaintiff 5% commission on the gross amount of business in excess of \$40,000.00, and testified that he could not make such an agreement, as the By-laws of the corporation would not permit him as President to do so; that he never made any contract with an employee other than a verbal hiring by the week; that in October, 1917, V. William Bailey, who was employed by the Freeny Company as shop foreman, came to witness for a contract; that witness told Bailey he gave no contracts, and plaintiff, overhearing the conversation, came into the office from the cutting room and said, "That's right, Mr. Bailey, I have no contract and do not see why you should have one." Witness further testified that Oscar Miller was under his employ from August 20, 1917, to September 29, 1917, as a chopper, and that witness was obliged to discharge him on account of drunkenness; that on July 27, 1918, plaintiff left for a two weeks' vacation, but did not return for four weeks, when he came into the store and witness heard him telling some one that he had had a commission as a Major offered him and that he was considering it; later witness asked plaintiff about the commission as a Major and advised him to take it; that witness then asked plaintiff about the money he owed the firm, and plaintiff said he would pay it shortly; that plaintiff then asked witness about his commission of 5% and witness told him he had never heard anything about a commission before, and then plaintiff went out without saying anything more; that the very first mention of 5% commission that witness ever heard was at the time when plaintiff returned from his vacation. Witness further testified that the sum of \$1.770.49 should be deducted from the gross amount of business shown by the books of the corporation as found by the auditor on behalf of the plaintiff and defendant's bookkeeper; which sum is made up of the following amounts: \$501.85, which represented sales entered on the books, and which were canceled and never filled or cut; \$700.50, which represented suits made up for customers, but which were never called for or delivered, and \$568.14, which represented model coats made up for window display and suits made for employees at cost; that there was no profit on these amounts and they should be deducted from the gross amount.

15 On cross-examination

witness testified that the suits left on hand and models made up for window display were sold to a second hand dealer in New York for less than cost and that sometimes he received deposits on orders which were made up and not delivered, but that he had gone over each item carefully and that there had been no profit, either gross or net, on any of these items, and witness claimed the deduction should be allowed.

Thereupon defendant produced as a witness Mrs. AMELIA PETERSON, who testified that she is the bookkeeper for the Freeny Company, and that the books of the corporation showed that plaintiff started to work on July 30, 1917, at \$40.00 per week; and that his salary was raised on September 10, 1917, to \$45.00 per week, and that he drew 47 weeks' pay at \$45.00 per week; that on February 23, 1918, at the direction of Mr. Freeny, she wrote two notes for \$225.00 each, one payable to the W. M. Freeny Co. on July 29, 1918, and the other to William M. Freeny, payable on demand, and that she saw plaintiff sign both notes and give them to Mr. Freeny; that the note offered in evidence by the plaintiff is in witness' handwriting and is one of the two notes written by her on February 23, 1918; that also, at the direction of Mr. Freeny, she drew a check of the company for \$225.00, which Mr. Freeny gave to plaintiff, and said paid check, endorsed by plaintiff, was offered in evidence; that she also saw Mr. Freeny give plaintiff \$225.00 in cash at the same time. Witness testified that plaintiff had access to the safe, for that in the absence of herself and Mr. Freeny he took charge of the office and made change from the same drawer in the safe in which the notes were kept; that the books of the corporation from July 30, 1917, to July 30, 1918, were audited by
16 herself and ———, a witness for the plaintiff, and that the said books showed sales amounting to \$73,877.67, which amount included cancellation orders amounting to \$501.85, suits made up for customers and left on defendant's hands, amounting to \$700.50, and model coats for window display and suits made for employees at cost, amounting to \$568.14, a total of \$1,770.49.

Thereupon defendant produced as a witness V. WILLIAM BAILEY, who testified that in September, 1917, he began working for the Freeny Company as shop foreman and in the latter part of October, 1917, he came down from the shop after the store had closed to talk to Mr. Freeny in the office about having a contract; that Mr. Freeny told him he never gave contracts, and that plaintiff, hearing the conversation, came in from the cutting room and said, "That's right, Mr. Bailey, I have no contract myself and I do not see why you should want one"; plaintiff also said that all that was necessary was to deliver the goods and no contract was needed.

Thereupon defendant produced as a witness C. M. MARTIN, who testified that he was employed by the Freeny Company for several

years as a cutter; that on a Sunday afternoon in the latter part of June, 1917, witness went with Mr. Freeny and plaintiff around Rock Creek Park in Mr. Freeny's car; that while they were on this ride Mr. Freeny offered to employ plaintiff as a cutter at \$40.00 per week, but plaintiff held out for more money and a contract, but Mr. Freeny would not give it. Witness also testified that Mr. Freeny never gave contracts. About October 1st plaintiff made some serious mistake in cutting some clothing and said to witness that he was afraid he was going to be fired for it, and said, "That's what I get for not having a contract."

Thereupon defendant produced as a witness Mrs IDA J. FREENY, who testified that she was the Secretary and Treasurer of the
17 W. M. Freeny Company corporation, and she denied that she ever told Mrs. Mitchell that Mr. Freeny owed Mr. Boerner the money he was suing for, and that she hoped he would make Mr. Freeny pay it; and witness also testified that at no time did she discuss the affairs of the corporation with Mrs. Mitchell or any other person.

The foregoing was all the evidence in this case necessary to enable the Appellate Court to understand the legal points involved.

Whereupon the plaintiff prayed for the following instruction:

Plaintiff's Instruction No. 11½.

The Court instructs the jury that if they believe from the evidence that the defendant company made a contract with the plaintiff to pay to him the sum of 5% commission on the gross amount of business done by the defendant during the year ending July 29, 1918, over and above \$40,000.00, and if the jury believe from the evidence that the gross amount of business done by the defendant company during that time was \$73,877.67, then the plaintiff would be entitled to recover in this action 5% upon the sum of \$33,877.67; that is, the sum of \$1,693.88, less \$460.00, admitted by the plaintiff to be owing by him to the defendant company on account of so-called commissions heretofore received by him, or \$1,233.88, which was granted as amended, to which counsel for the defendant then there duly excepted.

And thereupon said Justice, presiding, among other things, substantially charged the jury that if they found for the plaintiff they should allow him his commission of 5% on the gross amount of business shown by defendant's books, \$73,877.67, less \$40,000.00, without considering the admission of plaintiff in his Bill in Equity that he had received \$680.00 on account of said commission,
18 and also disregarding the deduction of \$1,770.49 claimed by defendant, but that they should deduct from said commission the sum of \$460.00 admitted by plaintiff as having been received on account of said commission, being \$5.00 per week for 47 weeks, and two loans, one for \$25.00 on June 11, 1918, and one for \$200.00 on July 29, 1918.

To that part of his Honor's charge which instructed the jury not to consider the admission of plaintiff in his Bill in Equity that he had received \$680.00 on account of his said commission and to disregard the deduction of \$1,770.49 claimed by the defendant, and also to his Honor's charge which instructed the jury as to the amount of the judgment, provided they should find for the plaintiff, instead of leaving it to the jury to determine from the evidence the amount of commission, if any, due the plaintiff, counsel for the defendant then and there duly excepted.

All the exceptions hereinbefore set forth were separately reserved during the trial, and each exception was duly and separately noted upon the minutes by the Justice presiding. And the said defendant now tenders this its Bill of Exceptions and prays the Court to settle and sign the same, which is accordingly done this 28th day of —, 1920, nunc pro tunc.

WILLIAM HITZ, J.

19 [Endorsed:] At Law. No. 63,187. R. Ben Boerner, Plaintiff, vs. W. M. Freeny Company, Inc., a Corporation, Defendant. Bill of Exceptions.

Endorsed on cover: District of Columbia Supreme Court. No. 3419. W. M. Freeny, Inc., a corporation, appellant, vs. R. Ben Boerner. Court of Appeals, District of Columbia. Filed Jul- 6, 1920. Henry W. Hodges, clerk.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

SEP 15 1920

IN THE

Henry W. Hodges
Plaintiff

Court of Appeals, District of Columbia

OCTOBER TERM, 1920.

No. 3419.

W. M. FREENY COMPANY, INC.
(a corporation),

Appellant,

vs.

R. BEN BOERNER,

Appellee.

BRIEF ON BEHALF OF APPELLEE.

T. MORRIS WAMPLER,
FOSTER WOOD,
Counsel for Appellee.

IN THE
Court of Appeals, District of Columbia

OCTOBER TERM, 1920.

No. 3419.

W. M. FREENY COMPANY, INC.
(a corporation),

Appellant,

vs.

R. BEN BOERNER,

Appellee.

BRIEF ON BEHALF OF APPELLEE.

INTRODUCTORY.

This is an action for the recovery of damages for the breach of a contract. The case of the appellee, herein referred to as the plaintiff, as laid in his declaration, is that pursuant to a contract and agreement between the plaintiff and the defendant corporation, the plain-

tiff started to work as a cutter for the defendant in its tailoring business about the first of August, 1917; under the terms of which said contract the plaintiff was to be paid the sum of forty dollars per week, and in addition thereto, a commission of five per cent upon the "gross business" done by the corporation, over and above forty thousand dollars, during the year ending June 29, 1918.

The plaintiff, corroborated in part by the witness Miller, proved his contract as alleged in the declaration as having been made with the defendant through its President, W. M. Freeny. The contract in its entirety, was denied by the defendant's said president, W. M. Freeny; other witnesses on behalf of the defendant gave testimony tending to corroborate a part of W. M. Freeny's evidence.

There was a verdict for the plaintiff.

Attention of the Court is respectfully asked to the fact that not a single authority is cited or relied upon by the Appellant in its brief, but counsel contents himself with complaining of the verdict of a jury, who passed upon a sharp conflict of the evidence. The testimony of the plaintiff and his witnesses proved the plaintiff's case; the testimony of the defendant's president and the witnesses on behalf of the defendant tended to prove the defendant's case, the non-existence of the contract. A jury has passed upon this conflict of testimony, and it is submitted that the verdict of the jury conclusively settles all disputed questions of fact. If the jury believed the plaintiff and his witnesses, the plaintiff was entitled to a verdict; if the jury believed the defendant's president and the witnesses for the defendant, the defendant was entitled to a verdict, and the Court so instructed the jury.

The assignments of error complained of by the appellant will be considered in their proper order.

FIRST ASSIGNMENT OF ERROR.

The appellant complains as the first assignment of error:

“The Court erred in his charge by instructing the jury as to the amount of the verdict provided they found for the plaintiff, instead of permitting the jury to determine for themselves from the evidence, the gross amount upon which commission, if any, was due the plaintiff.”

There was no plea of payment or set-off, only the general issue was pleaded (Record, p. 3). An auditor and an accountant testified that the gross business amounted to \$73,877.67, and the defendants' own books showed that its gross business amounted to that sum and appellant's brief admits it (p. 7). The plaintiff testified in chief that he had received from the defendant company from time to time on account of accrued commissions the sum of \$460.00. Notwithstanding there was no plea of payment, or plea of set-off, the plaintiff expressed at the bar a willingness that the amount of \$460.00 which he had received, should be deducted from the total amount of commissions due him. There was no real controversy as to the gross amount of business done, the figures establishing the gross amount of business were furnished from the defendant's own books, and yet the Court left it to the jury to accept or reject the plaintiff's testimony as to the amount of gross business (Record, p. 11); *the Court expressly left it to the jury to find the amount of gross*

business (Record, p. 11). W. M. Freeny, president of the defendant corporation, testified that the gross amount of business done during the period, was shown by the books of the corporation, and was as found by the auditor on behalf of the plaintiff, and the defendant's own bookkeeper (Record, p. 9).

SECOND ASSIGNMENT OF ERROR.

The second assignment of error follows:

“The Court erred in instructing the jury not to consider the \$680.00 which plaintiff had admitted in his Bill in Equity he had received on account of his said commission, although the Court had permitted said Bill in Equity to be introduced in evidence.”

The appellant's second assignment of error is difficult to comprehend because there is no justification in the record for the statement contained in the assignment. The assignment of error complains that the Court instructed the jury *not* to consider the \$680.00 which the plaintiff had admitted in his Bill in Equity he had received on account of his commissions. The record shows that the Court charged the jury that if they found for the plaintiff and found the gross business to be as shown by the defendant's books, they should allow him compensation of 5 per cent on the gross amount of business shown by the defendant's books, above \$40,000 (Record, p. 11), less \$460, the amount received by the plaintiff on account of his commission, and the appellant complains that the Court did not consider the admission of the plaintiff in his Bill in Equity that he had received \$680.00 on account of said commissions, and complains that the

Court disregarded a deduction of \$1,770.49, claimed by witness Freeny in computing the gross business. The plaintiff's testimony showed one sum as being the gross business, the defendant's testimony tended to show that the gross business was a lesser sum, the question was submitted to the jury (Record, p. 11) and their verdict settles this disputed question of fact.

The defendant did not request the Court to instruct the jury, that as a matter of law, the defendant was entitled to credit for \$680.00, or any other sum. Presumably the best reason for the defendant's failure to request this instruction is the fact, that under the state of the pleading, no such allowance or any other, could be made, because the defendant neither pleaded payment, or set-off. However, with the consent of the plaintiff the Court did instruct the jury to deduct from the commissions, in the event they found for the plaintiff, the sum of \$460.00, which the plaintiff testified he had received from the defendant on account of his said commissions. The Bill in Equity, referred to in this assignment of error, was introduced in evidence by the defendant, as a contradictory statement, contradictory of the testimony of the plaintiff upon the witness stand, who testified that he had only received the sum of \$460.00 on account of his said commissions. The said Bill in Equity, of course, was admissible and was relevant, and was to be considered by the jury along with all of the other evidence in the case. The jury, considering all the evidence in the instant case found in favor of the plaintiff, which is tantamount to finding that the contract was entered into as the plaintiff himself testified. The plaintiff expressed a willingness to have deducted from the amount of commissions due him on his contract, the sum of \$460.00 which he had re-

ceived from the defendant, this deduction was made more as a consent deduction and not as a matter of law, because under the state of the pleadings in this case there could have been no credit allowed the defendant of any payment he may have made.

Either the plaintiff or the defendant told an untruth in this case. It was not such a matter as to which a man might be mistaken. The defendant through its president either made the contract, or it did not make it. Men might differ as to the terms of the contract, but men cannot differ as to the fact of whether or not a contract was made at all. After hearing the evidence on both sides, and after observing the demeanor of the defendant's president upon the witness stand, the jury found that the testimony of the defendant's said president did not bear that stamp of verity which carries conviction, and by their verdict the jury found that the defendant's president had testified falsely in this case and rejected his testimony, accepting the testimony of the plaintiff as true. Such a verdict was a foregone conclusion, was inevitable, and must necessarily have been rendered by any body of intelligent men, after observing the demeanor of the defendant's president, and after listening to falsehood after falsehood which fell from his lips, and, when trapped, shamefully bowed his head in his own ignominy, making no attempt to justify his apparent and obvious wrongdoing.

To sum up this assignment of error tersely (1) the Court did not instruct the jury "not to consider the \$680.00" statement contained in the Bill in Equity (Record, p. 11); (2) the defendant had whatever benefit to which he was entitled, by reason of the allegations and statements contained in the said Bill in Equity, which was received in evidence when offered by the de-

fendant. The verdict of the jury causes this to be a closed chapter in this case.

THIRD ASSIGNMENT OF ERROR.

The third assignment of error of which the appellant complains :

“The Court erred in instructing the jury to disregard the sum of \$1,770.49, claimed by defendant as amount allowable to be deducted from the gross amount of business shown by the defendant's books.”

At the outset of the consideration of this assignment of error the Court's attention is respectfully asked to the fact that the trial judge did not instruct the jury to disregard the sum of \$1,770.49, claimed by the defendant as an amount allowable to be deducted from the gross amount of business shown by the defendant's books, as stated in the said assignment of error (Record, p. 11). The bill of exception shows (Record, p. 11) that counsel for appellant complains that the Court disregarded the said claim of the defendant, but the Court did not instruct the jury to disregard the claim, and the record does not show that the Court did so. The defendant requested no special instruction from the Court to the effect that as a matter of law the defendant was entitled to have the item of \$1,770.49 deducted from the gross amount of business shown by the defendant's books; the Court permitted the defendant to introduce evidence showing that this item was made up as follows: \$501.85 representing sales entered upon the books of the defendant, and which were cancelled and never filled; \$700.50 represented suits of clothing

made up for customers, but which were never called for and delivered, and \$568.14 which represents model coats made up for window display and suits made up for employees at cost. The Court was not asked to instruct the jury that these items should be deducted from the gross amount of business as shown by the defendant's books, and if the defendant conceived, as a matter of law, that these items should not enter into the computation of the gross amount of business done by the defendant company, objection should have been interposed upon the introduction in evidence of the books of the defendant company, which said books showed the above three items; and a special instruction covering the point should have been requested, and objection should have been interposed to the testimony of the defendant's own bookkeeper as to the amount of gross business done.

The contract alleged by the plaintiff, testified to by the plaintiff and his witnesses, and which the jury by their verdict have found existed, was that the defendant should pay to the plaintiff a commission of 5 per cent on the gross amount of business in excess of \$40,000.

“Gross Means Whole, Entire, Total”
Appeal of Braum, 105 Penna., 414, 415.

In *German Alliance Insurance Co. v. Van Cleave*, 191 Ill., 410, 61 N. E., 94, 96, the statute provided that all foreign insurance companies should at the time of filing their annual statements pay as taxes 2% on the gross amount of premiums received by them from business done in the state the previous year, and it was held that this means the whole or entire amount of

premiums received for business done in the state during the year. "The word 'gross' is opposed to 'net' and in its ordinary meaning is the entire amount of the receipts of a business, while the net receipts are those remaining after deductions, etc."

The plaintiff and his witnesses testified that the gross business amounted to \$73,877.67, and the defendant's books offered in evidence by the plaintiff showed the same figure. The defendant's witness, W. M. Freeny, testified that there should be a deduction from this figure of \$1,770.49; the ascertainment of the amount of gross business was left to the jury and their verdict settles this disputed question of fact. No ruling of the Court, as a question of law was requested, no special instruction setting forth the defendant's claim was asked.

Gross Means Total

Braun's Appeal, 105 Penna State, 114, 115.

Wickes v. Wickes, 98 Ill. App., 156, 162.

Scott v. Hartley, 126 Ind., 239, 246.

Gross Means Without Deductions

Wickes v. Wickes, 98 Ill. App., 156, 162.

The Word Means Taking in the Whole, Having No Deduction or Abatement.

Scott v. Hartley, 126 Ind., 239, 246.

Webster's Dictionary Defines Gross as Follows:

"Whole; entire; total; without deductions; as, the gross sum, or gross amount—opposed to net."

Because of the fact that Mr. Freeny, the president of the defendant company, testified that there was no profit on the three items going to make up the \$1,770.49,

counsel seems to think that these items should not be included in computing the gross amount of business done. Such a contention cannot be seriously entertained by one having a knowledge of the meaning of the word gross.

The defendant in this case was engaged in the tailoring business and this sum of \$1,770.49 represents money actually received by the appellant for clothing and labor, and the contention of counsel that no profit was made on the item is untenable, because the contract as established by the verdict of the jury was not that a commission should be paid upon the gross *profits* or earnings, but a commission *upon the gross amount of business done by the defendant company*. The plaintiff had no control of the defendant's business. If the defendant saw fit to make a suit of clothes for a friend at cost, this entailed labor upon the part of the plaintiff in just the same proportion as if the same suit of clothes had been made at a profit.

The verdict of the jury establishes a contract for a commission upon the gross amount of business; the plaintiff's witnesses, the books of the defendant company, and the testimony of the defendant's own bookkeeper establish the amount of the gross business done by the defendant company, and the verdict of the jury, upon this controverted question of fact is conclusive.

In commenting upon the three items going to make up the sum of \$1,770.49, which appellant claims should be deducted from the gross amount of business done, counsel again shows the want of knowledge of the meaning of the word "gross" when he says in his brief, on Page 7, "the suits made up and undelivered and the model coats were sold to a second-hand dealer in New York for less than cost, but there had been no

profit, either gross or net, on any of these items." The contract as established by the verdict of the jury, was not to pay a commission upon any profit, but upon the gross amount of business. As to what amounted to the gross amount of business, we have that which the defendant itself regarded as its gross business, shown by its own books. What better and more satisfactory evidence is available as to the amount of gross business done by the defendant, than the admissions of the defendant itself, contained in its own books.

FOURTH ASSIGNMENT OF ERROR.

The appellant complains, as the fourth assignment of error, of the granting of instructions No. 1½, on behalf of the plaintiff. The ground of the exception of the defendant to the special instruction given on behalf of the plaintiff, marked No. 1½ (Record, p. 11), is neither disclosed in the record, nor in appellant's brief. If counsel conceives that he has any legal ground upon which to base his objection to this instruction, he has not seen fit to reveal it in his brief filed herein. The instruction was predicated upon the case as testified to by the plaintiff and the witnesses for the plaintiff; the plaintiff testified to the contract of 5 per cent commission upon the gross amount of business during the year, over and above \$40,000; the auditor and accountant who examined the books of the defendant testified as a witness for the plaintiff that the books of the defendant showed that the gross amount of business during that period was \$73,877.67; the Court instructed the jury in this instruction complained of, that if they believed from the evidence that the defendant company made the contract (as testified to by the plaintiff), *and that if they believed from the evidence*

that the gross amount of business done by the defendant company during the period was \$73,877.67, that then the plaintiff would be entitled to recover in this action 5 per cent upon the sum of \$33,877.67, the balance after making the deduction of \$40,000. The auditor and expert accountant's evidence that the gross amount of business done by the defendant was \$73,877.67, was received without objection by the defendant; the defendant's books were introduced in evidence, which showed the same figures as being the gross amount of business done by the defendant. The defendant's president, W. M. Freeny, testified that there should be certain deductions in order to establish the gross amount of business; the verdict of the jury establishes the fact that there should be no deductions, and the verdict of the jury establishes that the gross amount of business done by the defendant, was the amount testified to by the plaintiff and his witnesses.

Why appellant should complain of plaintiff's instruction No. 1½, whereby the plaintiff voluntarily agreed that \$460.00, the amount he had received on account of his commissions, should be taken into consideration by the jury, when as a matter of law under the pleadings in this case, no deduction could have been made without his consent, is a matter of wonderment and amazement.

FIFTH ASSIGNMENT OF ERROR.

The appellant complains in this assignment of error of the action of the Court in overruling the motion for a new trial on the ground that the verdict was contrary

to the evidence and to the weight of the evidence. There was a sharp conflict in the testimony in this case; the testimony of the plaintiff and his witnesses tending to establish the contract as alleged, the testimony of the defendant's witnesses tending to show there was no such contract. The verdict of the jury settles this disputed question of fact, and why the ruling of the Court upon this motion is assigned as error, is something for which we will not undertake to account.

CONCLUSION.

Can it be possible that counsel for appellant is not familiar with the rule which obtains in an appellate court regarding disputed questions of fact passed upon by a jury?

Of what value, may it be inquired, is the lengthy argument contained upon pages 5, 6 and 7, of appellant's brief, dealing entirely with disputed questions of fact which have been passed upon by a jury?

The brief for appellant deals at length with an argument that certain deductions should have been made in computing the gross amount of business done by the defendant. The Court's attention is respectfully asked to the fact, that the trial court made no ruling as a matter of law upon the items claimed by the appellant as proper deductions in establishing the gross amount of business, and the Court was not asked to make a ruling. The witness for the plaintiff, an auditor and expert accountant, testified to the amount of gross business done by the defendant company. The books of the defendant company were received in evidence without objection, which upon their face showed the total gross business done by the defendant; W. M. Freeny, the

president of the defendant company, testified that certain deductions should be made in establishing the gross amount of business done; the case was left to the jury, and they were expressly instructed that if they believed the making of the contract (as testified to by the plaintiff), and that if they believed the gross business done by the defendant was \$73,877.67 (that which was testified to by the witness for the plaintiff), then their verdict should be for the plaintiff, etc.

So that in the last analysis, there is no question of law presented to the court for review. The case is one of disputed questions of fact which the verdict of the jury settles conclusively.

The verdict of the jury was clearly right, it could not have been otherwise, no error of law was committed, and the judgment of the lower court should be affirmed.

Respectfully submitted,

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